U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue date: 12Dec2001

In the matter of
Velone Vilssaint
Claimant

v. Case No. 2001 LHC 1710

Constructure, Inc./
Zilber Inc.
Employer

and
Florida Construction Commerce/
Reliance National Insurance
Carrier

and

Director, Office of Workers'
Compensation Programs
Party in Interest

DECISION AND ORDER
Denying Claim

This matter arises from a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the "Longshore Act" or "Act"), as amended, 33 U.S.C. §§§§ 901-950. The Claimant is represented by David C. Barnett, Esquire, Dania Beach, Florida. Zilber, Inc. (hereinafter "Zilber") and Reliance Insurance Company are represented by Mark Eckels, Esquire, Boyd and Jenerette, Jacksonville, Florida. Chris Flowers, Esquire, West Palm Beach, Florida appeared on behalf of Constructure, Inc ("Constructure"). and FCCI, a servicing agent. A hearing on this matter was held on August 20, 2001, in Fort Lauderdale, Florida. The parties represented that Constructure has a hold harmless agreement whereby Zilber agrees to stand in its shoes in case of liability under the Act (See Transcript, hereinafter "TR", at 10-13).

Thirteen joint exhibits (hereinafter "JX") were admitted into evidence as well as the Pre-hearing Order and the parties' joint stipulation, which were marked as administrative law judge exhibits (hereinafter "ALJ-1 and ALJ-2"). At hearing, the claimant was the sole witness; a translator was utilized. Post hearing, the transcript and briefs from the Claimant, Zilber, the Director and Constructure were received. They are hereby admitted into evidence.

Issue

Whether or not the Claimant is covered under the Longshore and Harbor Workers' Compensation Act. The essential questions initially involve "situs and status", along with jurisdiction.

Situs refers to the place where the injury occurred. The status test refers to the position the claimant holds with an employer.

Zilber argues that this matter does not meet the "status" test for jurisdiction under the Act. The Claimant and Constucture argue that the Claimant has met the "situs" test for jurisdiction, and that is sufficient; they also allege that the status test is met.

During the pendency of this matter, Reliance Insurance was placed onto receivership by the Insurance Commissioner of the Commonwealth of Pennsylvania. A request was made by Zilber to stay the proceeding; but on August 16, 2001, I issued an order denying the request. Although I have not been advised formally, I understand that the Florida Workers' Compensation Insurance Guarantee Association has assumed responsibility for Reliance pursuant to a state court order.[1] This issue is not relevant to this proceeding, as an employer remains responsible if jurisdiction attaches.[2] However, I find

---

[1] On October 24, 2001 the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida entered its Order Appointing Florida Department of Insurance Ancillary Receiver, and Notice of Automatic Stay ("the Florida Order"). The Florida Order states, "Based upon the entry of the Final Order of liquidation by the Pennsylvania Commonwealth Court dated October 3, 2001, all actions against insureds of Reliance in the State of Florida have been and are stayed by operation of law as set out in . . . Florida Statutes,has appropriate . . . " (Paragraph H, Page 6 of the Florida Order).

[2] Under the Supremacy Clause of the United States Constitution, Article VI, cl. 2, state laws may be preempted by federal laws. State laws may be preempted by federal laws if Congress evidenced an intent to occupy a given field. If Congress has not entirely displaced state regulation over the matter in question, state law still is preempted to the extent it actually conflicts with federal law or when state law stands as an obstacle to the accomplishment of the full purposes and objects of Congress. ***Silkwood v. Kerr-McGee Corp***., 464 U.S. 238, 248 (1984); ***City of Morgan City v. South Louisiana Electric Cooperative Ass'n***., 31, F.3d 319, 322 (5th Cir. 1994), *rehearing denied*, 49 F.3d 1074, *cert. denied* 516 U.S. 908 (1995). The determination whether federal law preempts a state action turns on congressional intent. Congressional intent is discerned by examining the explicit statutory language and the structure and purpose of the statute. ***Gude v. National Solid Wastes Management Association***, 505 U.S. 88 (1992). Preemption may be either expressed or implied, and "is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose." ***Jones v. Rath Packing Co.***, 430 U.S. 519, 525 (1977).

With respect to the Carrier's insolvency, federal preemption is necessary to prevent state laws from impeding enforcement of the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"). Congress' purpose in enacting the LHWCA was to remove workers' benefit claims for land-based maritime employees from common law litigation, thereby affording expeditious relief to injured workers while distributing their economic losses over the maritime industry and the consuming public. See, ***United States v. Bender Welding & Machine Co.***, 558 F.2d 761, 763-64 (5th Cir. 1977).

it does not, and this matter is moot.

Stipulations

The parties agreed that in the event that I find that I have jurisdiction over this claim, the following is accepted:

1. The Employer/Carrier will pay temporary total and/or temporary partial disability benefits from date of accident, March 30, 2000; and
2. That Dr. Phillip Cummings will be the Claimant*s free choice physician; and
3. That Employer/Carrier will pay all medical costs resulting from the industrial accident; and
4. That the average weekly wage is $480.00 with a corresponding compensation rate of $316.80.

Evidence

The Claimant was employed by Constructure as a carpenter/general laborer, assigned to help construct a building on a barge which was to become a sales office for a condominium which was being built on the Intracoastal Waterway (JX 11 at 12; JX 13, at 5). The barge was owned by Zilber as part of the Le Club project (JX 11, at 5-12, statement of Frances Halas, Zilber's Corporate Director of Insurance and risk manager) . With the construction of this condominium, there was no room for a sales office to be located, so a barge was brought to the job site, where a building was to be built as a sales office. Other than working on this barge, assisting to construct the sales office, and a single episode assisting to keep the barge level, the Claimant did not participate in any other facet of the construction project.(JX 11, at 12, 24; JX 13, at 4-6).

The barge did not have its own means of transportation (Id at 35- 36.). It did not have running lights, nor did it have its own source of power (Id.). Moreover, it did not have its own ballast system. The barge was not to be moved, but was to be permanently moored next to the condominium site (Id.). The barge was located on the Intracoastal Waterway, a navigable body of water.

Initially, post accident, a Florida Workers' Compensation claim was filed (Tr., 42). Later, this claim was filed.

Mr. Vilssaint was born in Haiti on February14, 1960. He emigrated to the United States in 1980 and has continually lived in the South Florida area. Mr. Vilssaint received his primary education while living in Haiti, where he went through the Fifth Grade in school. While living in Haiti, Mr. Vilssaint worked as a fisherman and did other types of work before moving to the United States (Tr. 25-26).

Upon moving to the United States in 1980, Mr. Vilssaint worked in a restaurant washing dishes. He has also worked in construction, but he has not obtained any type of licensing or certification. Mr. Vilssaint testified that in finding jobs, he would just walk the streets and find different construction companies that needed laborers to help out. Mr. Vilssaint advised that he can read and write in Creole, but he does not read or write in English. He states that he understands minimal English, but cannot converse in the English language, as his native language is Creole (Id., 26-29).

Mr. Vilssaint testified that in January 2000, he was looking for a job and he went to Constructure, which ultimately hired him. Mr. Vilssaint testified that he found the job while visiting the

job site located on the Intracoastal Waterway. He stated that upon his interview, he filled out his paperwork and was given the job to work by "David Keith" on a barge (Id.,31). Mr. Vilssaint said he was hired to work as a carpenter. According to Constructure, Rick Smith hired the Claimant (JX 13 at 14). According to Mr. Leblanc, the company president, Rick Smith was paid fourteen dollars ($14) an hour, and Rick Smith paid Mr. Vilssant twelve dollars ($12) an hour (Id. 14). Employment records do not identify the Claimant by name or Social Security Number (JX 3). However, Constructure admits that the Claimant was its employee, and that rthe payments were made to the Claimant. See Constructure's brief and JX 13, 14-15.

On March 30, 2000, when sides of the barge began to list, sandbags had to be moved about, in order to keep the vessel level (Tr 31-32). According to Mr. Blanc, too much weight was placed on one side of the barge, and the structure is not sitting perfectly balanced on the barge. Therefore, the barge was listing. The barge is broken up into containers,

> So, we would put in sandbags into a container to level off the barge. And then as we continued the construction then it might get over-compensated on the other side, so we would move sandbags to the other side of the barge.
>
> At the time he was injured -- and there*s eight access holes into the barge containment areas.
>
> At the time of the accident my understanding is they were moving sandbags from one containment area to another containment area to level off the barge.

JX 13., at 17.

The Claimant alleges that he did whatever labor was required of him; that he was involved not only in the leveling of the barge, but also in the loading of materials "necessary for work done on the barge." Claimant's Brief. "Ultimately, while engaged in the transfer of sand bags for leveling, Mr. Vilssaint fell and sustained injuries to his right arm and right elbow." Id. He was treated at Broward General Hospital. The Claimant's boss, ostensibly David Keith[3], assisted him from the barge and drove him to the hospital for his arm to be x-rayed and evaluated (Tr., 34).

After the accident, Constructure provided compensation benefits to the Claimant based on a salary of $480.00 per week. (JX 13, 19-20).

Mr.Vilssaint also advised that the nature of the work on the barge was a short-term project, and that he worked full time on this barge, and he expected that his employment with Constructure would end upon the completion of the work on the barge.

Credibility of the Claimant

I accept the testimony of Mr. Vilssant, who I find to be candid about his version of the facts, as truthful. His perspective is clouded by several misapprehensions, however. On several occasions, Mr. Vilssant seemed to have been provided partial information by "Mr. Keith", who did not testify. Apparently, "Mr. Keith" is an alias used by a person who acted as an agent for Constructure. I also give significant weight to the testimony of Mr. Le Blanc, President of Constructure. ***U. S. Industries/Federal Sheet Metal v. Director, OWCP***, 455 U.S. 608, 14 BRBS 631 (1982).

---

[3] Note that Constructure identifies the same person as Rick Smith.

Indemnification

According to Mr. LeBlanc, Constructure's President, he knew that the company was not insured for Longshore exposure, so an agreement was reached with Zilber to cover liabilities over water (JX 13, at 10-12):

> Constructure Inc., and its subcontractors have not included the cost of and assume no responsibility for the additional cost of Workers* Compensation Insurance as may be required by the Longshoremen*s and Harbor Workers* Compensation Act. The owner shall maintain a policy providing any coverage as required by law beyond the standard Workers* Compensation policy which Constructure Inc., and its subcontractors carry as required by law for all land-based construction. The owner shall hold Constructure Inc., and its subcontractors harmless in regards to any costs or claims associated with these additional coverages as may be required by law, but not provided by Constructure, Inc., and its subcontractors.

Id. at 13.

Initially, a claim was made against Constructure's state Workers' Compensation Carrier (JX 10, JX 11). Subsequently, this forum was chosen based in part on a determination regarding situs and status and the efficacy of the indemnification agreement (Id).

On the record, I referred the parties to ***Temporary Employment Services v. Trinity Marine Group, Inc.***, 261 F.3d 456, (5th Cir., Aug. 7, 2001), and asked them to brief it (Tr.,15). Unfortunately it was not discussed in the briefs. That case stands for the proposition that I do not have authority under Act to adjudicate disputes involving contractual indemnity and insurance issues between parties to an indemnification agreement. ***Therefore***, I will not enforce the agreement. I will also not give weight to insurance ramifications, although I note that they may be a motive for the relative position of the parties regarding whether situs and status are proved.

Constucture has not argued that the "borrowed servant' doctrine, implicit in indemnification, should be applied and extended to Zilber, giving Construture immunity under 33 USC §905. Moreover, I note that the Claimant and Constructure have not alleged that there are facts that would support such a finding. This doctrine remains vialble in the 11th Circuit, ***Bonner v. City of Pritchard***, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc). It remains viable in other circuits.[4] Prior to

---

[4] See ***Huff v. Marine Testing Corp***., 631 F.2d 1140 (4th Cir. 1980), ***Edwards v. Willamette Western Corp***., 13 BRBS 800 (1981) and ***Peter v. Hess Oil Virgin Islands Corp***., 903 F.2d 935, reh'g denied, 910 F.2d 1179, (3d Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991). The concept of an "employer" under the Act includes firms considered borrowing employers under the borrowed servant doctrine. "Borrowing employers, therefore, are entitled to whatever immunity is available under Section 5(a) of the Act. The 1984 Amendments to Section 5(a) were not intended to overrule the borrowed servant doctrine. In this case, the evidence is clear that claimant was a borrowed servant of Hess and that Hess is entitled to Section 5(a) immunity. Claimant had explicitly agreed to work under conditions controlled solely by Hess, his work was directed and supervised by Hess, and Hess provided safety equipment. Claimant, therefore, acquiesced in working for Hess and Hess paid his salary and provided longshore coverage." The Second Circuit has not taken a position,

Temporary Employment Services, in appropriate situations, the Fifth Circuit applied the doctrine. Under former Fifth Circuit analysis, the following factors were used to determine whether an employee is to be considered a borrowed employee of another:

(1) Who has control over the employee and the work he is performing, beyond mere suggestion of details or cooperation?
(2) Whose work is being performed?
(3) Was there an agreement, understanding, or meeting of the minds between the original and the borrowing employer?
(4) Did the employee acquiesce in the new work situation?
(5) Did the original employer terminate his relationship with the employee?
(6) Who furnished tools and place for performance?
(7) Was the new employment over a considerable length of time?
(8) Who had the right to discharge the employee?
(9) Who had the obligation to pay the employee?

Ruiz v. Shell Oil Co., 413 F.2d 310 (1969) and ***Gaudet v. Exxon Corp***., 562 F.2d 351 (5th Cir. 1977), *cert. denied*, 436 U.S. 913 (1978).

The evidence shows that although Dan Martincheck, an officer of Zilber, was on the site, when the injury occurred, Constructure did not relinquish control or the right to control Mr. Vilssant. See JX 11 and JX 13. The Claimant did not testify that anyone, other than "Mr. Keith" and Constructure told him what to do. Apparently application of all of the factors above shows that Constructure exercised control over Mr. Vilssant. ***Therefore***, the borrowed servant doctrine does not apply.

Coverage

When considering the concept of "coverage" under the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901 et. seq., it must be kept in mind that employment is best thought of as a linear continuum with three major groupings. First, there will be situations where the employment will not be considered "maritime" at all, and therefore, not covered under the LHWCA. (Such employment would more properly be covered under a state workers' compensation system.) Second, there will be the situation where the claimant is a longshore/harbor worker or other "maritime" worker and, thus, is clearly covered under the LHWCA. Third, there will be situations where the employment is maritime in nature, but the worker is more properly classified as a seaman attached to a vessel and entitled to a recovery under the Jones Act (Merchant Marine Act). 46 U.S.C. § 688.

Section 920(a) of the LHWCA grants a presumption of coverage, which applies unless the employer presents substantial evidence to rebut the presumption. 33 U.S.C. § 920(a) (1994). However, the Section 20(a) presumption does not apply to the issue of situs. ***Hagenzeiker v. Norton Lilly & Co.***, 22 BRBS 313 (1989). ***Stone v. Ingalls Shipbuilding, Inc***., 30 BRBS 209 (1996); ***Coyne v. Refined Sugars, Inc***., 28 BRBS 372 (1994); ***George v. Lucas Marine Construction***, 28

American Stevedoring Ltd. v. Marinelli, 248 F.3d 54 (2nd Cir. 2001).

BRBS 230 (1994), *aff'd mem. sub nom*. ***George v. Director, OWCP***, No. 94-70660 (9th Cir. May 30, 1996).

Situs

Section 3(a) states, with certain exceptions not applicable in this case, that "compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading repairing, dismantling, or building a vessel)." "The situs test is a geographical one, and even though a longshoreman may be performing maritime work, if he is not injured within the land area specified by the statute, he is not covered by the Act." ***Jonathan Corp. v. Brickhouse***, 142 F.3d 217, 222 (4th Cir. 1998). Sections 2(3) (status) and 3(a) (situs) of the LHWCA set forth the requirements for coverage.

Prior to the enactment of the 1972 Amendments, the LHWCA contained only a situs test. ***Nacirema Operating Co. v. Johnson***, 396 U.S. 212 (1969) (recovery was limited to those injured on navigable waters, including any dry dock). One of the motivations behind the 1972 Amendments, however, was the recognition that modern cargo-handling techniques had moved much of the longshore worker's duties off of vessels and onto the land. ***Northeast Marine Terminal Co. v. Caputo***, 432 U.S. 249, 6 BRBS 150 (1977). Accordingly, the covered situs of Section 3(a) was expanded, and a status test was added, extending coverage to "maritime employees," including, but not limited to longshore workers, harbor workers, ship repairmen, shipbuilders, and ship breakers. When the definition of "employee" was changed, the definition of "maritime employer" was changed accordingly. Subsequently, the LHWCA was again amended in 1984. These amendments primarily affect the concept of jurisdiction by adding several exclusions to coverage.

According to the Claimant, he was on the barge when the accident occurred (Tr.,33). "As I was proceeding to go down into the barge to remove the sand bags, I fell." Id. His presence on the barge was accepted as fact by Construture (JX 13, 17-18).

I find that Mr. Vilssant was injured at within the curtelege of the barge, over water, while employed by Constructure. ***Caputo,*** *supra* and ***Stratton v. Weedon Engineering Co***., ___ BRBS ___, (BRB No. 00-583) (February 13, 2001, on remand from an unpublished 11th Circuit decision) . ***Therefore***, I accept that the Claimant's injury meets the situs test.

The Claimant argues that by meeting the situs test, jurisdiction is established. Claimant relies on two cases, ***Director, OWCP v. Perini North River Associates***, 459 U.S. 297 (1983), and ***Randall v. Chevron USA. Inc.***, 15 F.3d 888(5th Cir. 1994), for the proposition that because the Claimant*s accident occurred over the navigable waters, the status requirement has been met, and that his accident arises under the LHWCA.[5] Zilber argues that these cases are distinguishable from this

---

[5] See also ***Fleischmann v. Director, Office of Workers' Compensation Programs***, 137 F.3d 131 (2nd Cir.1998), where the Second Circuit determined that an employee satisfies situs test as it existed before it was expanded by 1972 amendments, without having to make any further showing regarding status as maritime employee.

case, and alleges a significant difference that exists between the Fifth Circuit and Eleventh Circuit in terms of jurisdiction. In the Randall case, the Fifth Circuit has held that a worker who upon navigable waters when his injury occurs is automatically covered. Zilber argues that the Eleventh Circuit requires that a status showing be made. ***Brockington v.Certified Electric. Inc***.. 903 F.2d 1523 (11th Cir. 1990), *cert. denied*, 498 U.S. 1026, 111 S.Ct. 676, 112 L.Ed.2d 668 (1991).

Status

The status test refers to the position the claimant holds with an employer. The Act provides coverage for work injuries for "employees" "but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)." 33 USC §903(a). Therefore the first step is to determine whether Mr. Vilssant falls within the definition of "employee", and if so, whether he meets the requirements.

Employment Relationship

Section 2(3) of the LHWCA defines "employee" as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker, but such term does not include--
>
> (A) individuals employed exclusively to perform office clerical, secretarial, security, or data processing work;
>
> (B) individuals employed by a club, camp, recreational operation, restaurant, museum, or retail outlet;
>
> (C) individuals employed by a marina and who are not engaged in construction, replacement, or expansion of such marina (except for routine maintenance);
>
> (D) individuals who (i) are employed by suppliers, transporters, or vendors, (ii) are temporarily doing business on the premises of an employer described in paragraph (4), and (iii) are not engaged in work normally performed by employees of that employer under the Act;
>
> (E) aquaculture workers;
>
> (F) individuals employed to build, repair, or dismantle any recreational vessel under sixty-five feet in length;
>
> (G) a master or member of a crew of any vessel; or
>
> (H) any person engaged by a master to load or unload or repair any small vessel under eighteen tons net;
>
> if individuals described in clauses (A) through (F) are subject to coverage under a State workers' compensation law.

33 U.S.C. § 902(3). Section 2(4) of the LHWCA defines "employer" as follows:

> The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters on the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

33 U.S.C. § 902(4).

Although Zilber was initially identified by the Claimant as the employer[6], Constructure was his employer. The Claimant testified that he worked for Contracture when he was injured (Tr 29-30, 40). Payment records are acknowledged by Constructure as payment to the Claimant for work on the Le Club project (JX 13, at 14 and JX 3).

1984 Amendment

The 1984 amendments were intended to:

> insure stability for both the employer and the employee. The employer needs to know its obligations with respect to workers' compensation for its employees, and make plans accordingly. Employees should not fall within the coverage of different statutes because of the nature of what it is that they were doing at the moment of injury.

H.R.Rep. No. 570, 98th Cong., 2d Sess., Pt. 1, at 6, reprinted in 1984 U.S.Code Cong. & Admin.News 2734, 2739. The test is:

> one must determine whether "employment" is defined by what he was doing at the moment he was injured, or whether it is defined by the nature of employment in which he was generally engaged.

Brockington, *supra*. As set forth above, Section 2(3) of the Act defines an "employee" as "any person engaged in maritime employment ... including any harbor-worker ...." Again, the Benefits Review Board has consistently held that the Section 20(a) presumption that a claim comes within the provisions of the Act is inapplicable to the threshold issue of jurisdiction. ***Sedmak v. Perini North River Associates***, 9 BRBS 378 (1978); aff'd sub. nom. ***Fusco v. Perini North River Associates***, 601 F.2d 659 (2d Cir. 1979), *cert. granted, vacated and remanded*, 444 U.S. 1028 (1980), 622 F.2d 1111 (2d Cir. 1980) (decision on remand).

Also as set forth above, the Claimant was employed on a full-time basis to work on the construction of an office on the barge. The Claimant argues that the nature of his employment, which involved full-time employment in the "construction" and "repair" of the barge "along with the loading and unloading of materials for this barge, would certainly indicated that Mr. Vilssaint meets the status requirement." Contracture agrees, characterizing the work as "loading and unloading". See Brief, at 4.

Mr. Vilssant testified that the first instance of listing was the date of accident (Tr., 32). Although sand bagging was not "my responsibility", the Claimant was told to do it, so he did (Id., 33). He never helped load or unload cargo (Id, 38). He did help unwrap materials after they were placed on the barge by others (Id., 41). However, those materials were to be used in the construction project (Id.). He never helped repair the barge (Id., 38) and he had never worked on barges previously (Id.).

Even under the 1972 amendment, the status requirement insured that the Act only covered

---

[6] See JX 1.

those people who spend at least some of their time in indisputably maritime operations. ***Northeast Marine Terminal v. Caputo***, 432 U.S. 249, 273 (1977). The term, "harbor-worker" includes "at least those persons directly involved in the construction, repair, alteration or maintenance of harbor facilities (which include docks, piers, wharves and adjacent areas used in the loading, unloading, repair or construction of ships)."[7] The Supreme Court continues to apply a status test, but did not accept certiori in ***Brockington***.[8]

In ***Brockington***, the Claimant, who was an electrician, was required to be transported to the job site via a ferry. While in route, over water, the Claimant sustained an injury. Zilber admits that there was no dispute in ***Brockington*** that the Claimant*s injuries occurred on the navigable waters, thus indicating that the situs requirement was met (See Zilber's Brief).[9] It argues, however, the ***Brockington*** Court aptly noted that the critical question was whether or not the status component of the jurisdictional two prong test was met. It argues that in finding that the Claimant*s activities were not maritime in nature, the Court relied upon the United States Supreme Court*s decision in ***Herb*s Welding. Inc.. v. Gray***, 470 U.S. 4 14(1985), which found that there was nothing inherently maritime about the tasks that Gray performed. Zilber argues that the nature of the Gray*s tasks was not significantly altered by the situs of injury:

> As suggested above, the Claimant*s work in constructing this sales office is not significantly altered by the marine environment. There is nothing inherently maritime of this activity of constructing a condominium sales office.
>
> In the ***Brockington*** case, the Eleventh Circuit stated that, "what matters to a determination of

---

[7] ***Hurston v. McGray Const. Co***., 29 BRBS 127 (1995), on remand from ***Hurston v. Director, OWCP***, 989 F.2d 1547, 26 BRBS 180 CRT)(9th Cir. 1993), *reh'g* ***Hurston v. McGray Const. Co***., 24 BRBS 94 (1990), *recon. en banc denied*, BRB No. 88-4207 (Aug 13, 1991)(unpublished); ***Stewart v. Brown & Root, Inc***., 7 BRBS 356 (1978), *aff'd sub nom*. ***Brown & Root, Inc. v. Joyner***, 607 F.2d 1087, 11 BRBS 86 (4th Cir. 1979), ***cert. denied***, 446 U.S. 981 (1980). See also ***Ripley v. Century Concrete Services***, 23 BRBS 336 (1990); ***Dupre v. Cape Romain Contractors***, 23 BRBS 86, 90 (1989); ***Olson v. Healy Tibbitts Constr. Co***., 22 BRBS 221 (1989).

[8] For example see ***Chesapeake and Ohio Ry. Co. v. Schwalb***, 493 U.S. 40, 110 S.Ct. 381, 107 L.Ed.2d 278 (1989). In that case, in a dissent prior to ***Brockington***, Justice Stevens stated: "I continue to believe that the text of the Act 'merely provides coverage for people who do the work of longshoremen and harbor workers-- amphibious persons who are directly involved in moving freight onto and off ships, or in building, repairing, or destroying ships', and that the Act's history in no way clouds the text's plain import."

[9] The Court ruled that because Brockington lacked the characteristics of a "maritime employee" such that he would qualify for coverage under the LHWCA, the Employer/Carrier received summary judgment.

maritime status is the description of his regular employment." ***Brockington***, 903 F.2d at 1528. Zilber avers:

> The Court went on to hold that although Mr. Brockington was injured on navigable waters, he was not in any sense engaged in loading, unloading, repairing or building a vessel and his de minimis connection to maritime activity is simply insufficient to fulfill the status requirement of the LHWCA.

Id. The major factor for determination under ***Brockington*** is that the employer is in the construction business, and the claimant was hired as a construction worker.

However, in ***Bienvenu v. Texaco, Inc***.,164 F.3d 901(5th Cir., 1999) the Court determined that a worker injured in the course of his employment on navigable waters is engaged in maritime employment and meets the status test only if his presence on the water at the time of injury was neither "transient or fortuitous". This is contrary to ***Brockington***, supra, as ***Brockington*** was decided after 1984 and is not limited to fact patterns "over water" and "transient or fortuitous" as it recognized that by amending the statute in 1984, Congress intended to include status as an element. Even prior to 1984, if an employee was not injured over water, he or she had to meet both the status test and the situs test. ***Director v. Perini North River Associates***, 459 U.S. 297, 103 S.Ct. 634 (1983).

Therefore, ***Perini*** is not controlling as to when or how to determine status, and ***Brockington*** analysis will be applied.

Vessel In Navigation

Before considering whether the Claimant is an "employee" under the Act, I will consider whether the barge was a "vessel". In other venues, a vessel is defined as "every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water." 1 U.S.C. § 3. See also 46 U.S.C. § 801. Obviously, this is a very broad definition. In fact, under a literal interpretation, any floating structure that could be used for transportation is a vessel. See John T. Lozier, *Comment*, 20 ***Tul.Mar.L.J***. 139, 143 (1995). Thus, a barge with no mobility of its own, would fit the description. The statutory definition of vessel that applies to the LHWCA is equally unhelpful. As amended in 1972, Section 2(21) of the LHWCA defines "vessel" as:

> any vessel upon which or in connection with any person entitled to benefits under this Act suffers injury or death arising out of or in the course of his employment, and said vessel's owner, owner pro hac vice, agent, operator, charter or bare boat charterer, master, officer, or crew member.

33 U.S.C. § 902(21). The basic criterion used to establish whether a structure is a vessel is "the purpose for which [it] is constructed and the business in which it is engaged." ***The Robert W. Parsons***, 191 U.S. 17, 30, 24 S.Ct. 8, 12 (1903). "The fact that it floats on the water does not make it a ship or a vessel " ***Cope v. Vallette Dry-Dock Co.***, 119 U.S. 625, 627 (1887). The business or employment of a watercraft is determinative, rather than its size, form, capacity, or means of propulsion. See 119 U.S. at 629-30.

In ***Herb's Welding v. Gray***, *supra*, in applying the pre-1984 Amendments, the Court stated:

> [F]loating structures have been treated as vessels by the lower courts.... [W]orkers on them, unlike workers on fixed platforms, enjoy the same remedies as workers on ships. If

permanently attached to the vessel as crewmembers, they are regarded as seamen; if not, they are covered by the LHWCA because they are employed on navigable waters.

In ***Caserma v. Consolidated Edison Co.***, 32 B.R.B.S.25 (1998), a Claimant was injured while working on a barge used as a mobile energy generating station in New York City's harbor. Claimant's duties included maintaining the equipment and mooring the barge in relation to movement. The administrative law judge had found that to be entitled to coverage, Claimant needed to be injured on a vessel on navigable waters. However, relying on ***Director, OWCP v. Perrini North River Associates***, *supra*, the Board found that there is no requirement that Claimant have a direct connection to navigation or commerce. Thus, the Board approached the Fifth Circuit's construction of jurisdiction. However, several circuit court cases illustrate that floating structures are not always what they seem to be, or what they were constructed to be. Although these cases deal primarily with barges that have become work platforms, a case dealing with a small raft has provided the basis for a loose test to determine whether or not a platform is a "vessel." ***Bernard v. Binnings Constr. Co.***, 741 F.2d 824 (5th Cir. 1984). Floating work platforms which were determined not to be vessels had at least some of the following criteria in common:

(1) The structures were constructed/re-constructed for use primarily as work platforms;

(2) The structures were moored/secured when the injury occurred;

(3) Although "capable" of movement and sometimes moved, the transportation function was merely incidental to the primary purpose of serving as a work platform;

(4) The structure generally had no navigational lights and/or navigational equipment;

(5) The structures had no means of self-propulsion;

(6) The structures were not registered with the Coast Guard;

(7) The structures did not have crew quarters/a galley. [10]

---

[10] See also Green v. C.J. Langenfelder & Sone, Inc.,30 BRBS 77 (May 9, 1996) (dredge, with no engine or navigational capabilities except for pull lines, which was used to excavate oysters and load them onto barges, and moored to virtually the same position during each 6-month work cycle held not to be a vessel).

See also ***Burchett v. Cargill, Inc***., 48 F.3d 173 (5th Cir. 1995) (midstream bulk cargo transfer barge which was constructed/used primarily as work platform, which had been moored for ten years, and whose transportation function was incidental to its primary purpose, was not a vessel); ***Sharp v. Wausau Ins. Cos.***, 917 F.2d 885 (5th Cir. 1990), amended sub nom. ***Sharp v. Johnson Bros. Corp***., 923 F.2d 46 (5th Cir. 1991) (four barge assemblies, including two spud barges and two flat deck barges used in connection with rebuilding a bridge and which were frequently moved during the work could be vessels--case remanded to trial court for a jury determination); ***Ellender v. Kiva Constr. & Eng'g***, 909 F.2d 803 (5th Cir. 1990) (general purpose and spud barges assembled solely to build a platform were transported to a job until its completion; a crane temporarily positioned on the spud barge is not equivalent to a derrick barge); ***Menard v. Brownie Drilling Co.***, 1991 U.S. Dist. LEXIS 13531 (E.D. La. 1991) (workover rig placed on barge which was lowered and sunk until the job was finished, then floated to a new location was not a barge).

In consideration of whether the barge was competent to be used in navigation, I accept that the record revealed that it was placed as the site of the real estate office without any intent to use it for any other purpose. I accept the Claimant's testimony that the only time that the barge needed to be adjusted due to listing was on the date of accident. He testified that sand bagging was not "my responsibility" but he did it on the date of injury (Tr., 33). Mr. Le Blanc stated that the barge's sole purpose was as a sales office (JX 13, at 33). These facts support Zilber's contention that the barge was not in navigation. None of the elements set forth by ***Bernard v. Binnings Constr. ,*** *supra*, apply to the barge. ***Therefore***, I accept that the barge is not a vessel in navigation.

Maritime Employment

Again, under Section 3(a) one must be an "employee" under the Act to qualify. Section 2(3) defines employee in part as "any person engaged in maritime employment".

I do not accept that Mr. Vilssant was engaged in maritime employment, under ***Brockington***. I

See also ***Gremillion v. Gulf Coast Catering Co.***, 904 F.2d 290 (5th Cir. 1990) (a quarter boat barge specially equipped with living quarters/work area brought to a shore, and which was spudded down and moored, was not a vessel); ***Ducrepont v. Baton Rouge Marine Enters***., 877 F.2d 393 (5th Cir. 1989) (cargo barge converted to a stationary work platform by permanently mooring to shore and only moved short distances due to water level changes was not a vessel); Davis v. Cargill, Inc., 808 F.2d 361 (5th Cir. 1986) (cargo barge converted to a permanent painting and sandblasting work platform anchored to the river bed and permanently attached to land was not a vessel though moved to accommodate changing river tides).

See also ***Waguespack v. Aetna Life & Casualty Co.***, 795 F.2d 523 (5th Cir. 1986), cert. denied, 479 U.S. 1094 (1987) (small floating work platform permanently located in a slip and used to facilitate removal of grain barge covers is not a vessel); ***Blanchard v. Engine & Gas Compressor Servs***., 575 F.2d 1140 (5th Cir. 1978), question certified, 590 F.2d 594 (5th Cir. 1979) (barges sunk in marsh to use as compressor station and not moved in 15 years, with no intent to move are not vessels); ***Cook v. Belden Concrete Prods***., 472 F.2d 999 (5th Cir.), cert. denied, 414 U.S. 868 (1973) (barge which became a construction platform on which concrete barges were built, served as a stationary platform and was not a vessel).

See also ***Ducote v. Keeler & Co.***, 953 F.2d 1000 (5th Cir. 1992) (for purposes of determining whether floating structure is a "vessel," one objective factor used to determine whether the primary purpose of the structure is that it is used for transportation, is raked bow. Although the mere presence of raked bow does not mean that the floating structure is a "vessel," raked bow is a piece of evidence from which conflicting inferences could be drawn).

But see ***Tonnesen v. Yonkers Contracting Co., Inc.***, 82 F.3d 30 (2d Cir. 1996) (Second Circuit disagreed with regard to the first Bernard factor (namely, the Fifth Circuit's focus on the original purpose of the structure), finding that the first prong of the test should focus on the present purpose of the floating structure).

also find that the facts can be distinguished from similar cases. In ***Jones v. Aluminum Co. of America***, 31 BRBS 130 (1997)[11], a Florida case, Jones was a millwright, welder and general mechanic. This was found initially not to constitute "maritime employment" because it was not an integral part of loading or unloading a vessel. An administrative law judge stated that when bauxite, shipped on a vessel, spilled from Conveyor A to Conveyor B it came into possession of the ultimate user for manufacturing purposes; therefore, it was no longer in the unloading process and service to Conveyor B did not affect the unloading process. The Board held that claimant's work on a conveyor belts was a regular, non-discretionary, albeit infrequent, part of his job. repair work on Conveyors B and C satisfied the status requirement because the conveyors moved shipped, not stored, materials, and were part of the unloading process. An appeal of this decision was dismissed. ***Aluminum Co. of America v. U.S. Dep't of Labor***, No. 97-6959 (11th Cir. Apr. 30, 1998), *reh'g denied*, November 12, 1998, *cert.den*,1999, ***Aluminum Co. of America v. Jones***, 526 U.S. 1111 (1999). In the present situation, leveling the barge was a single episode, that occurred on the date of injury. The Employer, Constructure, was not in the business of shipping, and the barge was not used for transportation of or processing of a product, such as bauxite in *Jones I*.

Historically a number of tests were adopted to determine whether maritime employment was performed.

1. *Traditional test*: Jurisprudence has established coverage for workers in "traditional" longshoring occupations, such as loaders and unloaders, container stuffers and strippers, and checkers.[12]

2. *Integral or Essential Part Test*. *In* ***Caputo***, *supra*, the Supreme Court held that a terminal worker loading cargo from ships to trucks and a cargo checker were covered since their work was "clearly an integral part of the unloading process." ***Caputo***, at 271. *In* ***Chesapeake & Ohio Ry. Co. v. Schwalb***, 493 U.S. 40 (1989), laborers injured while doing housekeeping and janitorial services while cleaning spilled coal from loading equipment were found to be covered, as well as a machinist engaged in his primary duty of repairing coal loading equipment. See also ***P.C. Pfeiffer Co. v. Ford***, 444 U.S. 69 (1979) (a worker unloading cotton from a dray wagon onto a pier warehouse, as well as a warehouseman

---

[11] A/k/a "***Jones I***".

[12] See, e.g., ***Handcor, Inc. v. Director, OWCP***, 568 F.2d 143, 7 BRBS 413 (9th Cir. 1978), *aff'g* 1 BRBS 319 (1975); ***Spennato v. Pittston Stevedoring Co.***, 5 BRBS 117 (1976); ***Green v. Atlantic Container Lines***, 2 BRBS 385 (1975); ***Batista v. Atlantic Container Lines***, 2 BRBS 193 (1975); ***Stockman v. John T. Clark & Son, Inc***., 2 BRBS 99 (1975), ***aff'd***, 539 F.2d 264, 4 BRBS 304 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977) . In ***Gilliam v. Wiley N. Jackson Co.***, 659 F.2d 54 (5th Cir. 1981), rev'g 12 BRBS 556 (1980), *cert. denied*, 459 U.S. 1169 (1983), the Fifth Circuit found coverage because the claimant was unloading pilings from a barge cargo from a vessel at the time of injury, which constitutes longshoring operations, even though the pilings were to be used in bridge construction.

fastening cargo to a railcar, were covered by the LHWCA); ***Childs v. Western Rim Co.***, 27 BRBS 208 (1993) (checking and stripping containers constitute intermediate steps in the movement of cargo and satisfy the status requirement).

3. *Functional Relationship (to the loading process) Test*. Workers whose activities were a step or more beyond actual loading and unloading may also be covered. The key to coverage in the context of longshoring operations became a "functional relationship" test: did the worker's activity have a functional relationship to maritime transportation as distinguished from such land-based activities as trucking, railroading, or warehousing" ***Pittston Stevedoring Corp. v. Dellaventura***, 544 F.2d 35 (2d Cir. 1976), *aff'd sub nom*. ***Northeast Marine Terminal Co. v. Caputo***, 432 U.S. 249 (1977). Affirming ***Dellaventura***, the Supreme Court stated that work involving cargo as it moves between sea and land transportation after its immediate unloading is maritime in nature. Id at 249.

However, a locomotive engineer who hauled rail cars to the docks for dock employees to either load or unload, and hauled them away when dock employees were finished loading or unloading them, was not engaged in "maritime employment"--he was engaged in the process of overland transportation. ***Stowers v. Consolidated Rail Corp.***, 26 BRBS 155 (CRT) (6th Cir. 1993). Compare with Schwalb, 493 U.S. 40, where workers at a railroad coal-loading facility adjacent to navigable water were covered because of their specific job duties. A messman/cook did not have a functional relationship to cargo-transfer operations. ***Coloma v. Chevron Shipping Co.***, 897 F.2d 394 (9th Cir. 1990), *aff'g* 21 BRBS 318 (1988), cert. denied, 498 U.S. 818 (1990). Here the Board rejected the claimant's argument that his work as a messman was directly linked to the loading and unloading of ships, stating that such work was too far attenuated from employer's cargo-transfer operations to constitute maritime employment under the LHWCA.

4. *Directly Involved (in the loading process) Test*. An employee is a maritime employee and may be covered if, at the time of his injury, his duties have a sufficient nexus to an occupation enumerated in Section 2(3) of the LHWCA, even though he is not engaged in the occupation itself. ***Jacksonville Shipyards v. Perdue***, 539 F.2d 533 (5th Cir. 1976), vacated and remanded, 433 U.S. 904 (1977). In Perdue, the court had held that an employee met the definition of maritime employee "if at the time of his injury (a) he was performing the work of loading, unloading, repairing, building, or breaking a vessel, or (b) although he was not actually carrying out these specified functions, he was directly involved' in such work." 539 F.2d at 539-40.

5. *Point of Rest Test*. The point of rest refers to "the point where the stevedoring operation ends (or, in the case of loading, begins) and the terminal operation function begins (or ends, in the case of loading)." ***Caputo***, *supra*. As noted, the Supreme Court has rejected the "point of rest" theory.

6. *Moment of Injury Test*. This test looks to a claimant's duties at the time of injury in determining whether status is established. As noted previously, under ***Caputo*** a claimant need not be engaged in maritime employment at the time of injury to be covered by the LHWCA The Eleventh Circuit has also applied the moment of injury test. ***Browning v. B.F. Diamond***

Constr., 676 F.2d 547 (11th Cir. 1982), rev'g 14 BRBS 313 (1981), *cert. denied*, 459 U.S. 1170 (1983). The court found coverage because the decedent was unloading metal forms from a barge at the time of death, and was thus engaged in longshoring activities. . In ***Odom Construction Co. v. United States Department of Labor***, 622 F.2d 110 (5th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981), the court held that the claimant, a construction worker who was injured while moving concrete blocks used to moor barges, met the status requirement of Section 2(3). Although the court held first that the claimant's coverage at the moment of injury arguably could be the sole basis for its decision, it did not rest on this ground alone. Viewing all of the circumstances of the claimant's employment the court found that, where the claimant was performing maritime work and where a significant part of employer's business (20 per cent) was maritime in nature, the policies of the LHWCA favored coverage. See also ***Universal Fabricators v. Smith***, 878 F.2d 843, 22 BRBS 104 (CRT) (5th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990); ***Gilliam v. Wiley N. Jackson Co.***, 659 F.2d 54 (5th Cir. 1981), *rev'g* 12 BRBS 556 (1980), cert. denied, 459 U.S. 1169 (1983) (claimant covered because he was assisting in the transfer of pilings from a barge at the time of injury.) .

7. *Overall Employment Test*. The Board's approach had been to determine whether a claimant's overall employment was maritime in nature, regardless of whether his duties at the moment of injury are covered. ***Brown v. Reynolds Shipyard***, 9 BRBS 614 (1979). See also ***Thibodeaux v. Atlantic Richfield Co.***, 580 F.2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979), where the court held that status may be based either upon the maritime nature of the claimant's activity at the time of his injury (moment of injury test) or based upon the maritime nature of his employment as a whole. This requires only that the claimant spend "some portion" of his overall employment performing maritime activities. Performing "episodic" maritime activities which were not a regular part of a claimant's duties did not, however, constitute some time regularly spent in indisputably longshoring operations. ***Felt v. San Pedro Tomco***, 25 BRBS 362 (1992).

8. *Substantial Part of Employment in Indisputably Maritime Activity Test*. Since ***Caputo***, it is well settled that an employee who regularly performs duties relating to maritime employment should not be denied coverage if injured while temporarily performing some non-maritime activity. What has been at issue is how much of a claimant's overall employment must be spent in maritime activity. The Board relied on the ***Caputo*** language that persons are covered if they spend "at least some of their time" in covered work in formulating its test for coverage, holding initially that an employee satisfies the status requirement if he spends "a substantial part of his employment in indisputably maritime activity." ***Howard v. Rebel Well Serv***., 11 BRBS 568 (1979), rev'd, 632 F.2d 1348 (5th Cir. 1980). In determining whether a substantial portion of a claimant's overall duties were maritime in nature, the Board employed one of two tests.

9. *At least some part" test*. ***Caldwell v. Universal Maritime Services Corp***., 22 BRBS 398 (1989). A "primary function" test was used where an employee clearly had certain principal activities, but spent an insignificant amount of time performing other activities. ***Maples v. Marine Disposal Co***., 14 BRBS 619 (1982) (claimant spent majority of his time picking up

trash, which was his primary duty--dumping garbage onto barge was merely incidental). Several circuit courts of appeal have overruled the Board's "substantial portion" test, and by inference, the "primary function" test. ***Graziano v. General Dynamics Corp***., 663 F.2d 340 (1st Cir. 1981), rev'g 13 BRBS 16 (1980); ***Levins v. Benefits Review Board***, 724 F.2d 4 (1st Cir. 1984), *rev'g* 15 BRBS 281 (1983); ***Boudloche v. Howard Trucking Co***., 632 F.2d 1346 (5th Cir. 1980), *rev'g* 11 BRBS 687 (1979), cert. denied, 452 U.S. 915 (1981); ***Lennon v. Waterfront Transport***, 20 F.3d 658 (5th Cir. 1994); ***Schwabenland v. Sanger Boats***, 683 F.2d 309 (9th Cir. 1982), *rev'g* 13 BRBS 22 (1980), cert. denied, 459 U.S. 1170 (1983).

10. *Realistically Significant Relationship to Maritime Employment Test* This test, applied in ***Thorton v. Brown & Root, Inc***., 707 F.2d 149, 152-53 (5th Cir. 1983), *cert. denied*, 464 U.S. 1052 (1984), was expressly rejected in ***Herb's Welding***, supra, at 418-19 as being too expansive.

Applying the facts to each of the tests set forth above[13], the following is determined:

1. Under the traditional test the Claimant is not a loader or unloader[14], container stuffers and stripper, or checker, nor is his job analogous to them.. Constructure, the Claimant's Employer is not involved in maritime employment. In fact, it admittedly did not meet the criteria to obtin Longshore Act insurance (JX 11). According to Kenneth LeBlanc, Constructure's President, aftewr investigating, and after a review of the nature of the job, he knew that the company was not insured for Longshore exposure, so an agreement was reached with Zilber to cover liabilities over water (JX 13, at 10-12).

2. Under the integral or essential part test, the Claimant advised that he is a carpenter/laborer, and that his duties did not include what would normally be considered to be "maritime work". Mr. Lebanc admitted that this was not "maritime" work (Id).

3. Functional Relationship (to the loading process) Test. Although the Claimant alleges that the nature of his employment, which involved full-time employment in the "construction" and "repair" of the barge "along with the loading and unloading of materials for this barge", this is unproved. According to the Claimant and Constructure's President, it was not the barge that was being constructed, rathewre it was a sales office to be placed on the barge. Mr,. Vilssant testified that he never helped repair the barge, (Id., 38). He has no history of maritime work and never worked on barges before this job began (Id.). Moreover, the placing of sandbags was done only once and although the Claimant alleged that the barge had lost moorings, and was adrift, this is also not proved. Despite argument to the contrary, the Claimant never helped load or unload cargo, (Tr, 38). He did help unwrap materials after they were placed on the barge by others, (Id., 41). But it is interesting to note that those materials were to be used in the construction project (Id. 41).

---

[13] Although they are not legally tenable.

[14] See 3 and 4 below for a more thorough discussion regarding Claimant and Constructure's factual allegations.

4. Directly Involved (in the loading process) Test. Again, I incorporate my remarks above. One can distinguish materials that are in the stream of commerce, those expected to be placed into shipping or receiving from those used to construct the office. Therefore, I do not accept that:

(a) the Claimant was performing the work of loading, unloading, repairing, building, or breaking a vessel, or

(b) although he was not actually carrying out these specified functions, he was directly involved in such work.

5. Point of Rest Test. As no "stevedoring" is involved, this test does not apply.

6. Moment of Injury Test. Mr. Vilssant testified that the first instance of listing was the date of accident, (Id., 32). If I accept that the barge was a "vessel", then he was involved in stabilizing it and it would constitute maritime work. However, it is more reasonable that the barge was not a vessel, as it was not contemplated that it would be used as such. The evidence shows that even Zilber, the owner did not contemplate such a use (JX 11, 24-25, Testimony of Ms. Halas). None of the elements set forth by ***Bernard v. Binnings Constr. ,*** *supra*, apply to the barge. Therefore, after a review of all of the evidence, I accept that the barge is not a "vessel".

7. Overall Employment Test. The evidence shows that the job was not contemplated by Constructure to involve maritime work (JX 13 at 10-12).

8. Substantial Part of Employment in Indisputably Maritime Activity Test. I have accepted the Claimant's testimony that the only time that the barge needed to be adjusted due to listing was on the date of accident. Therefore, I accept that adjustment of the barge and lifting sandbags was an insignificant part of the job.

9. At least some part or "Primary function" test. On the date of accident, the Claimant did attempt to lift sandbags located on the barge. The Claimant's testimony that the only time that the barge needed to be adjusted due to listing was on the date of accident. I have already found that adjustment of the barge and lifting sandbags was an insignificant part of the job. I also find that adjusting the sandbags was not maritime in nature to any extent.

10. Realistically Significant Relationship to Maritime Employment Test. The Claimant and Constructure argues that the job involved repairs to the barge and involved loading. This position is inconsistent with the Claimant's testimony. Mr. Vilssant testified that the first instance of listing was the date of accident (Tr., 32). Although sand bagging was not "my responsibility", the Claimant was told to do it, so he did (Id. 33). He never helped repair the barge before the date of accident (Id., 38). As to unloading, he never helped load or unload cargo (Id., 38). He did help unwrap materials after they were placed on the barge by others (Id., 41). Those materials were to be used in the construction project (Id., 41). Therefore the assertions are untenable.

Therefore, the Claimant has failed to establish status under all of the historical tests set forth above. Applying ***Brockington***, incorporating my discussion regarding the facts, although the injury occurred in situs, I find:

1. The Claimant was not engaged in a maritime occupation. He was a construction laborer/carpenter.

2. He was not involved the the manufacture of, or the processing of any product that was to be

put into the stream of commerce or that is capable of either shipment or receipt.

3. Constructure, not Zilber was Mr. Vilssant's employer.

4. The Employer, Constructure, was not in the business of shipping or receiving cargo or any product, and the barge was not used for transportation of or processing of a product.

5. The barge is not a "vessel" as the evidence discloses that it was not intended to be used for transportation, is not self propelled, etc. as set forth above.

6. I also do not accept the Claimant's contention that the nature of his employment was in the "construction" and "repair" of the barge. It was a building, not the barge that was under construction.

7. Therefore, the lifting of sandbags was not an act of repair of a vessel.

8. I do not accept that by unwrapping materials that were entirely used for construction of the office, that the Claimant was involved in loading or unloading "shipments", or was involved in maritime activities.

9. Therefore, The Claimant is not an "employee" as defined by 33 USC §902(3).

10. Moreover, the Claimant is not an employee as required by 33 USC §903 (a).

I reiterate that just because the injury occurred on the barge, and the barge was over water at the moment of injury, these facts are not dispositive. Moreover, the fact that the barge was listing, does not mean that the Claimant was at that instant performing "maritime" work. The employer's business remains construction, and the claimant was involved in construction. Lifting and moving sandbags is not an activity related to "loading, unloading, repairing, dismantling, or building a vessel".[15] I have determined that the barge does not meet the definition of "vessel".

I also accept that the Claimant and his employer were engaged in a construction project that was contemplated to have been covered by Florida Workers' Compensation coverage. The contract with Zilber was probably an afterthought, to which the Claimant was not a party, based upon a legal opinion based upon the assumption that "over water" is enough to confer coverage. Under ***Brockington***, I find that one must determine whether "employment" is defined by what he was doing at the moment he was injured, or whether it is defined by the nature of employment in which he was generally engaged. I find that the answer is "construction" to both prongs. The Claimant was a construction worker, hired by a construction company (Tr. 29-32; JX 13, 5-7, 14-15).

As to the unwrapping of construction materials[16], note that in ***Brockington***, a similar argument that he "loaded and unloaded" materials from the boat at the time of his injury was considered to be "largely irrelevant". That is because the Court determined that the work was not maritime and was covered by state worker's compensation. The Court determined that the case was,

> in all other respects ... it [was] a garden variety state tort claim" in which it was appropriate to apply state law). Similarly, application of state law would result in no interference with federal maritime policy given the absence of conflicting statutory provisions and the lack of explicit support for a cause of action under these circumstances.

---

[15] 33 USC §903(a).

[16] Which are not related to maritime activity.

Id. Like Brockington, Mr. Vilssant contracted for employment in construction pursuant to state law. The evidence discloses that Constructure, likewise, acted according to the same expectation . A Florida Workers' Compensation claim was filed (Tr., 42). Mr. Leblanc initially called the state workers' compensation carrier to report the injury (JX 12 at 6).[17]

Therefore, although the injury occurred over water, after reviewing the entire record and a review of the law, I find that the Claimant has not met the status requirements established by the 1984 amendments to the Act and by ***Brockington***. Under 33UCS §903(a), I find that the Claimant was not a maritime "employee" and that the barge in question was not customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.

Attorney's Fee.

As the Claimant is not entitled to any benefits, a "successful prosecution" has not been made, and attorneys fees are not owing. 33 USC §928(a).

Alternative Findings and Conclusions of Law

Although I find that the status test is necessary to establish jurisdiction in this case and that the evidence discloses that application of the status test precludes coverage under the Act, in the event the ruling is not accepted, the following is noted.

On the date of injury, March 30, 2000, the Claimant was taken to Broward General Hospital (Tr., 34). He was given a shot due to swelling of the arm and was told to return (Id.). He testified that he has had shots and has been prescribed pain killer medication by physicians since then (Id., 35). A physician has advised that he needs an operation (Id.). The Claimant was referred to Dr. Philip Cummings, who performed an independent medical examination paid for by FCCI (JX 12 at 11). The Claimant testified that he was paid compensation benefits for approximately one month after the accident (Id., 36). He has not returned to work (Id., 37). I also note:

JX 4, the medical records of Dr. Kenneth Garrod,
JX5, the medical bills of Dr. Kenneth Garrod,
JX6, the medical records of Dr. Phillip Cummings
JX7, the medical bills of Dr. Phillip Cummings

I also note the stipulations of the parties.

Therefore, if my conclusion that jurisdiction has not been established is not accepted, the following findings and legal conclusions would be applicable:

1. The Claimant was injured within the course and scope of his employment.

---

[17] I note with interest ***FCCI Fund (FEISCO) v. Cayce's Excavation, Inc***., 726 So.2d 778, 781+,(Fla. 1st DCA, 1998) where a claimant who was injured while working on barge afloat on navigable waters sought workers' compensation benefits for work-related injury. The District Court of Appeal held that the claimant was covered by Longshore and Harbor Workers' Compensation Act, and thus was precluded recovery under state's Workers' Compensation Act. Although the Court applied the situs test, it did not consider the status test.

2. The date of accident was March 30, 2000.
3. That the average weekly wage is $480.00 with a corresponding compensation rate of $316.80.
4. The Employer/Carrier would owe temporary total and/or temporary partial disability benefits from date of accident, March 30, 2000; and
5. The Employer/Carrier would receive credit for compensation paid; and
6. That interest would be due and owing; and
7. The Claimant's last day of work was the date of injury and he has not been released to return to work;
8. That Dr. Phillip Cummings would be the Claimant*s authorized physician; and
9. That Employer/Carrier would owe all medical costs resulting from the industrial accident.
10. That jurisdiction would reserved to consider a reasonable attorney's fee.
11. There is no Section 8(f) issue.

However, as the evidence shows that the status requirement has not been met, the above are not appropriate, pending review.

ORDER

The claim for benefits is **DENIED**.

SO ORDERED.

A
Daniel F. Solomon
Administrative Law Judge